IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
JUL 6 1972
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OCTOBER TERM, 1971

NO. 71-1270

MARY McKEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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THE INLAND PRESS, DETROIT, MICHIGAN

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To the Supreme Court of the United States and the Honorable Justices thereof:

I

It appears that certiorari was denied on the Solicitor General's contention in his Memorandum in Opposition that the Government was able to sustain a conviction based on a statutory presumption that an individual's name signed to a tax return shall be prima facie evidence for all purposes that the return was actually signed by him. (26 U.S.C. 6064).

The statutory presumption created by Section 6064, Title 26 violates the Fifth Amendment to the Constitution of the United States which guarantees the right of the accused to remain silent, by compelling the accused to take the stand in rebuttal to overcome such prima facie evidence. *Casella* v. *U.S.* 304 F. Supp. 756 (1969).

The Court has in various instances found constitutionally permissible the use of a presumption based upon proof of given facts at a trial. However, this Court has held that such a statutory presumption is not permissible where not supported by substantiated legislative history. Thus, in *U.S. v. Turner,* 90 S. Ct. 642, 396 U.S. 398, 24 L. Ed. 2d 610 (1970), the Court held that the statutory presumption which applied to heroin could not be equally applicable to cocaine because of the differences in the historical background of the two substances.

Further, this Court searched exhaustively the legislative history of organized crime as related to extortion in examining the constitutionality of Title 18, U.S.C.A., Section 891. There, this Court found the necessary supportive legislative history. See *Perez* v. *U.S.,* 91 S.Ct. 1357, 402 U.S. 146, 28 L. Ed. 2d 686 (1971).

However, in the instant case there is no such history possible. It is a general situation that a husband might sign a wife's name in a situation of criminal potential. A taxpaper might sign the name of a preparer of such taxes with a view to insulating himself from his self-conceived criminality and thereby place the putative preparer in the position of being convicted unless he takes the stand.

The lack of substantiability of any legislative history to support Section 6064 is a patent violation of the Fifth Amendment.

II

It is clear that the Government assumed the burden of disproving Mary McKee's claim of Electronic Surveillance and it is equally clear that the Government never acquitted itself of this burden. *In Re: Evans* (465 F2d. 1239 (1972))

> "The Government, not appellants, has the information which can substantiate or dissolve their contentions, and for that reason Congress expected that the burden of going forward would shift to the Government."

During oral argument had on this matter before the three Judge panel of the 6th Circuit Court of Appeals, that panel referred to Agent Marek's testimony as incredible where he stated under oath:

> "Q Is your statement that in your branch they never used electronic surveillance, is that right?
>
> A I have never seen or been involved in any electronic surveillance." (J. App. 159a).[1]
>
> "Q So then in your entire history in the IRS here in Detroit, you don't know of any electronic surveillance that was used in any case, is that correct?
>
> A That's correct." (J. App. 160a)

Subsequent testimony of Agent Marek produced the following questions and answers:

> "Q On December 30, 1966, you were a special agent of the Internal Revenue?
>
> A That's correct.
>
> Q And by December 30, 1966, you had completed or were in the process of completing the investigation of Mary McKee?
>
> A I don't recall which stage the investigation was at that particular time.
>
> Q But at least you were aware of an investigation on December 30, 1966?

[1] The designation "J. App." refers to the joint appendix filed in the Court of Appeals below.

A Yes, sir.

Q Did you submit any memoranda with respect to your or other agent's electronic surveillance of the Defendant Mary McKee or the investigatee, Mary McKee?

A I submitted reports in regard to this type of request, but I don't believe there was any specifically regarding Mary McKee.

Q You submitted a report with regard to this type of request and by "this type of request" you mean a request such as indicated on Defendant's Exhibit I for identification?

A Yes, sir." (J. App. 174a, 175a, (See Exhibit A, this appendix p.1a)).

The panel ordered that the Assistant United States Attorney obtain a current statement over the signature of Attorney General John Mitchell, either denying or affirming the presence of electronic surveillance. Government counsel subsequently forwarded a letter to one Judge of the panel reiterating the same original, unreliable assurances that were given during the evidentiary hearing on this matter and again reassuring the Court that he had no personal knowledge of any electronic surveillance, coupled with reference to a Department of Justice memo he found in his files dated October 6, 1967, from a tax division staff attorney to then Assistant Attorney General Rogovin indicating no electronic surveillance of McKee; completely ignoring the mandate of the three Judge panel of the 6th Circuit Court of Appeals and the memorandum from the Attorney General (See Exhibit B this appendix, p. 2a).

In view of the foregoing, we respectfully pray that this Court order the Solicitor General to file a memorandum disclosing the information required by the Court's Order

in *Black* v. *United States,* 384 U.S. 983, *Alderman* v. *United States,* 394 U.S. 165, and others, including the memorandum to all United States Attorneys from the Attorney General —Memo No. 493, dated November 3, 1966, and that this Court pending receipt of such memorandum, hold in abeyance its determination of this petition.

III

CONCLUSION

For the reasons above submtted, petitioner respectfully suggests that this Court reconsider its Order Denying Certiorari, withdraw said Order, and grant Certiorari herein to the Court of Appeals.

Respectfully submitted,

S. ALLEN EARLY,
RUSSELL L. SWARTHOUT,
Attorneys for Petitioner.

CERTIFICATE

Counsel hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58 (2) of the Rules of this Court.

S. ALLEN EARLY, and
RUSSELL L. SWARTHOUT,
Attorneys for Petitioner.

Dated: July 6, 1972.

COPY OF A TELETYPE FROM THE COMMISSIONER OF INTERNAL REVENUE TO ALL DISTRICT DIRECTORS, INTERNAL REVENUE SERVICE, DATED AND RECEIVED DECEMBER 30, 1966:

"MY MEMORANDUM DATED DECEMBER 6, 1966 EXPLAINED WHY IT IS ESSENTIAL FOR THE SERVICE TO OBTAIN COMPLETE INFORMATION ON INSTANCES OF ELECTRONIC SURVEILLANCE, INCLUDING: THE OVERHEARING OR RECORDING OF ANY TELEPHONE OR NON-TELEPHONE CONVERSATION UNLESS WITH THE CONSENT OF EVERY PARTY TO THE CONVERSATION; THE USE OF A PEN REGISTER; THE USE OF A TAILING DEVICE ON A VEHICLE WITHOUT THE CONSENT OF THE OWNER, RELATED TO INVESTIGATIONS CONDUCTED BY THE SERVICE. INFORMATION REQUESTED BY THE MEMORANDUM PERTAINED TO SPECIFIC CASES LISTED IN THE ATTACHMENTS OR TO BE SUBSEQUENTLY TRANSMITTED. SINCE COMPLETE INFORMATION IS REQUIRED TO ASSURE THAT NO INJUSTICES UNDER THE LAW MAY RESULT OR HAVE RESULTED FROM THE USE OR POTENTIAL USE OF INFORMATION OBTAINED BY ELECTRONIC SURVEILLANCE, IT IS ABSOLUTELY NECESSARY THAT ALL KNOWN OR REASONABLY SUSPECTED INSTANCES OF ELECTRONIC SURVEILLANCE BE IMMEDIATELY REPORTED, REGARDLESS OF WHETHER THE CASE INVOLVED IS OR IS NOT NAMED ON A LIST PREVIOUSLY TRANSMITTED TO YOU. THE FULL IMPACT OF INVESTIGATIVE ACTS CANNOT BE EVALUATED WITHOUT KNOWING ALL SPECIFIC INSTANCES OF ELECTRONIC SURVEILLANCE. I CONSIDER THE NEEDS OF JUSTICE TO BE SO COMPELLING THAT I AUTHORIZE YOU TO ASSURE ALL EMPLOYEES THAT NO ADMINISTRATIVE ACTION, REPEAT, NO ADMINISTRATIVE ACTION, NEITHER DISCIPLINARY NOR DISCRIMINATORY AS TO CAREER ADVANCEMENT, WILL BE TAKEN AGAINST AN EMPLOYEE BASED ON INSTANCES OF ELECTRONIC SURVEILLANCE IN ORGANIZED CRIME OR IN SIMILAR INVESTIGATIONS PRIOR TO JULY 1, 1965, TO BE REPORTED NOW, OR ON FAILURE TO HAVE PREVIOUSLY REPORTED SUCH INSTANCES, PROVIDED THE FAILURE TO REPORT WAS NOT BOTH WILLFUL AND WHILE UNDER OATH. IN ORDER THAT THE NATIONAL OFFICE CAN HAVE IMMEDIATE KNOWLEDGE OF ALL INSTANCES OF ELECTRONIC SURVEILLANCE, EACH ASIT CRIMINAL INVESTIGATOR, SPECIAL AGENT, INTELLIGENCE AND ASTT SUPERVISOR, DIVISION OR BRANCH CHIEF, AND OCD COORDINATOR, INCLUDING ANY EMPLOYEE WHO HAS HELD ONE OF THESE POSITIONS AT ANY TIME SINCE JANUARY 1, 1957, WILL SUBMIT AN IMMEDIATE REPORT. WHEREVER A FORMER EMPLOYEE IS KNOWN TO BE AVAILABLE AND BELIEVED TO BE AMENABLE TO SUBMITTING SUCH A REPORT, HE SHOULD BE CONTACTED AND ASKED TO SUBMIT A REPORT. THE REPORT MUST IDENTIFY EACH SPECIFIC INSTANCE OF ELECTRONIC SURVEILLANCE IN WHICH THE EMPLOYEE PARTICIPATED OR ABOUT WHICH HE HAS KNOWLEDGE OR REASONABLE SUSPICION, REGARDLESS OF WHETHER THE SURVEILLANCE WAS CONDUCTED BY EMPLOYEES OF THE SERVICE OR BY PERSONS OUTSIDE THE SERVICE. ATTEMPTS AT SURVEILLANCE SHOULD BE REPORTED EVEN THOUGH NO INFORMATION WAS OBTAINED OR USED. THE REPORT MUST TRY TO IDENTIFY (1) EACH CASE WHERE ELECTRONIC SURVEILLANCE WAS UTILIZED OR ATTEMPTED BY NAME OR CASE NUMBER, IF KNOWN, (2) THE TYPE AND LOCATION OF SUCH SURVEILLANCE, (3) THE DATE OR DATES OF SUCH SURVEILLANCE, (4) THE NAMES OF ANY OTHER CASES, OTHER THAN THOSE IDENTIFIED IN (1) ABOVE, IN WHICH INFORMATION OBTAINED FROM SURVEILLANCE WAS OR MIGHT HAVE BEEN UTILIZED, AND (5) THE NAMES OF OTHER SERVICE EMPLOYEES BELIEVED TO HAVE KNOWLEDGE OF THE SURVEILLANCE. NEGATIVE REPORTS TO THIS OFFICE ARE REQUIRED. REPORTS REQUIRED BY THIS TELETYPE SHOULD BE SUBMITTED TO THE DISTRICT DIRECTOR BY DISTRICT PERSONNEL, OR TO THE REGIONAL COMMISSIONER BY REGIONAL PERSONNEL, AS SOON AS POSSIBLE AND NO LATER THAN JANUARY 13. REGIONAL COMMISSIONERS AND DISTRICT DIRECTORS WILL FORWARD THE REPORTS TO THE ASSISTANT COMMISSIONER, COMPLIANCE, DAILY AS RECEIVED AND CONDUCT A FOLLOWUP TO ASSURE THAT A REPORT HAS BEEN SUBMITTED NO LATER THAN JANUARY 18, BY ALL EMPLOYEES REQUIRED TO REPORT. IMMEDIATELY AFTER SUBMITTING THE REPORT REQUIRED HEREIN, EACH EMPLOYEE WILL EXPEDITIOUSLY COMPLETE AND SUBMIT IN TRIPLICATE A QUESTIONNAIRE FORM OF THE TYPE REQUIRED BY MY DECEMBER 6 MEMORANDUM ON EACH CASE OR INCIDENT RAISED IN THE REPORT REQUIRED BY THIS TELETYPE, EXCEPT FOR THOSE CASES IDENTIFIED ON A LIST PREVIOUSLY TRANSMITTED TO YOU, FOR WHICH QUESTIONNAIRES ARE REQUIRED UNDER EARLIER INSTRUCTIONS. DISTRIBUTION WILL BE IN ACCORDANCE WITH INSTRUCTIONS IN THE DECEMBER 6 MEMORANDUM. REGIONAL COMMISSIONERS AND DISTRICT DIRECTORS SHOULD REPRODUCE THIS TELETYPE AND MY DECEMBER 6 MEMORANDUM AS NECESSARY TO ASSURE THAT ALL APPROPRIATE PRESENT AND FORMER EMPLOYEES RECEIVE A COPY OF EACH.

Exhibit A

Exhibit B

2a

DEPARTMENT OF JUSTICE

WASHINGTON, D. C. 20530

November 3, 1966

MEMO NO. 493

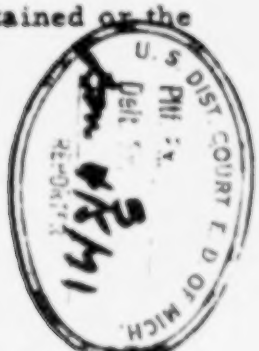
TO: All United States Attorneys

FROM: Ramsey Clark
Acting Attorney General

You will recall that in May 1966 the Department advised the Supreme Court of facts relating to the case of Black v. United States, October Term, 1965, No. 1029. Its memorandum in that case stated in pertinent part:

> Notwithstanding the Department of Justice's conclusion that the monitoring of conversations between petitioner and his attorney had no effect upon his conviction or the fairness of his trial, we have no doubt that in the circumstances outlined above petitioner is entitled to a judicial determination. We also recognize that petitioner has standing to raise, in a district court, the question whether other conversations (i. e., conversations not involving an attorney-client relationship) which were overheard as a result of the listening device installed in his suite furnished any leads or evidence in his case. At an appropriate hearing, the government proposes to submit all of the facts upon which a full judicial determination can be made.

This Department must never proceed with any investigation or case which includes evidence illegally obtained or the



fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness. We must, also, scrupulously avoid any situation in which an intrusion into a confidential relationship would deny a fair hearing to a defendant or person under investigation.

For this reason we are in the process of requesting each investigative agency concerned to review its files in order to determine whether there has been wiretapping or electronic surveillance touching a particular case or matter. We are making a similar review of cases and matters pending in the Department. You will be informed immediately whenever a case or matter in your office is found to fall in this category.

Many matters are referred directly to your offices by the investigating agencies. Special attention must be given to these. But, it is imperative that you and your assistants make every effort to ascertain whether any cases, now pending or hereafter received, present the problem of wiretapping or electronic surveillance. No single means of checking is infallible but you should keep in mind that the same person or matter may have been investigated by several Federal or State agencies and the information

supplied to you may in fact come from more than one source. You should be particularly attentive to those cases which involve, directly or indirectly, hard core elements of organized crime.

It is, of course, the very rare case--one out of thousands--in which you will encounter the problem to which this memorandum is addressed. The problem will arise in cases in which some investigation was conducted prior to July 1965. Present practice, adopted in July 1965 in conformity with the policies declared by President Johnson on June 30, 1965 for the entire Federal establishment, prohibits the installation of listening devices in private areas (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked. Intelligence data so collected will not be available for investigative or litigative purposes.

If you have any reason whatever to believe that there has been wiretapping or electronic surveillance touching a particular case, you should immediately notify Mr. J. Walter Yeagley,

Assistant Attorney General, Internal Security Division, so that further inquiry may be pursued by the Department.